No. 3682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CALIFORNIA MIDWAY OIL COMPANY, ASSOCIATED OIL COMPANY, COLUMBUS MIDWAY OIL COMPANY, THIRTY-TWO OIL COMPANY, L. B. McMURTRY, J. M. McLEOD and STANDARD OIL COMPANY,
Appellees.

BRIEF FOR APPELLANT

RAYMOND BENJAMIN,
CHARLES D. HAMEL,
Special Assistants to the Attorney General,
Solicitors for Appellant.

Neal, Stratford & Kerr, S. F. 15398

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE.

This is a suit in equity brought by the Government to restrain continuing waste and depletion of the oil contents of a tract of public land described

as the Northwest Quarter (NW¼) of Section Thirty-two (32), Township Thirty-one (31) South, Range Twenty-three (23) East, Mount Diablo Base and Meridian, and for other relief. The legal title to the land is in the United States. It is included within the area described by the Presidential withdrawal order of September 27, 1909. Drilling for oil was going on upon the land at the date of said withdrawal order. On January 1, 1909, the quarter section had been claimed as an oil placer mining claim by an alleged association of eight persons consisting of H. E. Bashore, R. B. Welch, W. A. Keenan, Eugene Metz, William A. Mahr, Herbert M. Walker, F. H. Romaine, Jr., and C. Rupert Walker, in whose names the defendant L. B. McMurtry posted and recorded notices of location (Plaintiff's Exhibit 10, Record page 881), McMurtry acting under power of attorney from the alleged locators dated December 19, 1907 (Plaintiff's Ex. 4, R. 877).

McMurtry had, since 1908, been extensively engaged in speculating in and disposing of alleged locations for prospecting and developing oil land, a part of the public domain in California (R. 769).

In 1903, while in Chicago attempting to sell stock in a company organized for the development of such locations known as the Oriental Oil Company, through L. A. Shadburne, whom McMurtry had known for many years and who was employed in selling stock for the Oil Company (R. 119-120), McMurtry became acquainted with C. A. Dunbar

(R. 120). At the request of McMurtry Dunbar obtained from his friends and acquaintances employed at the Stock Yards in Chicago two powers of attorney (R. 123), each executed by sixteen persons known in the record as the Chicago locators, authorizing him to locate in their names mineral claims in any part of the United States and to improve, develop and make proof thereof, and to grant, bargain and sell the same. McMurtry caused these powers of attorney to be recorded in San Benito County, California (Plaintiff's Exs. 8 and 9, R. 881), and acting under them posted notice of locations in the names of the signers on numerous tracts of unoccupied, possible oil properties in that county, which, however, were never developed or proved to be oil bearing (R. 814).

In 1906 or 1907 development in the Midway Oil fields in Kern County became active and McMurtry, about January 1, 1907, posted or caused to be posted location notices in the names of the Chicago parties on sundry quarter sections of land in that district—some twenty-seven in number—including the property involved in this suit (Plaintiff's Exs. 28 and 29, R. 893). Subsequently, on November 9, 1908, he caused certified copies of the Chicago powers of attorney to be recorded in Kern County (R. 880-881). The several tracts described in the location notices so posted were merely prospective oil lands and none of them were developed and no discovery of oil was made on any of them until after the abandonment of the locations on December 31, 1908

(R. 814). In the fall of 1908, however, McMurtry, acting as attorney in fact for the Chicago locators made a contract with Mrs. J. M. McLeod for the development of the property in controversy, and also the northeast quarter of the same section upon which a location notice had been posted in the names of certain of the Chicago parties, under the terms of which Mrs. McLeod was to drill for oil on each tract, and if it proved to be oil bearing she was to have as consideration therefor one-half thereof (Plaintiff's Ex. 36, R. 899). A short time thereafter the contract was modified by reducing the area to accrue to Mrs. McLeod to the south sixty acres of each quarter section (R. 804), and her interest became vested in the California Midway Oil Company (R. 902), which some time in December, 1909, moved lumber and other material onto the south sixty acres of the northwest quarter of the section preparatory to beginning active operations (R. 763-867). Before it had commenced drilling, however, McMurtry learned that there were defects in the locations made in the names of the so-called Chicago locators. These defects consisted of discrepancies in the spelling of names and use of initials (R. 775). McMurtry had also discovered that the stakes by which the locations were made were approximately a quarter of a mile out of line (R. 801). McMurtry advised McLeod, acting for Mrs. McLeod, of the supposed defects and discrepancies shortly after he had learned of them and told McLeod that he would remedy the same (R. 775-

776). McMurtry thought that these defects might be corrected from Chicago (R. 776). He also consulted his attorney (R. 776). In the very late part of 1908 he determined to relocate this land (R. 778). He thereupon, on January 1, 1909, relocated all the lands previously located by him in the names of the Chicago parties, posted and caused to be recorded new notices covering practically the same tracts, together with some additional tracts, in the names of certain residents of New York under powers of attorney executed by them in December, 1907 (Plaintiff's Exs. 4, 5, 6 and 7, R. 877 to 880). These powers of attorney were obtained under the following circumstances: During the summer and fall of 1907 McMurtry had transferred his activities to New York and was engaged in selling stock in an oil company known as the Empire Oil and Development Company (R. 666), which company claimed under lease some of the lands located in the names of the Chicago locators and subsequently relocated in the names of the New York locators (R. 776). The financial panic of that year made it impossible for him to continue his operations, and in December he concluded to return to California (R. 777-778, 312). Before doing so he asked associates of his by the names of Thorn, Thickens, Powell and Searls to obtain four powers of attorney, each executed by eight persons, authorizing him to locate, develop and dispose of oil lands in their names if he should be able to locate any such land open to entry on his return to California (R.

778). The purpose was to locate lands in San Benito County, not in Kern County (R. 778). Thickens, Thorn, Powell and Searls thereupon approached their employes and friends and requested the execution of such powers of attorney, assuring them that they would thereby incur no financial responsibility and there might be something in it for them (R. 739, 669, 313). Four powers of attorney, one of which was used in making the location in suit, were thereupon executed and acknowledged, each by eight separate persons, authorizing and empowering McMurtry to locate in the names of the signers mineral claims, to develop and improve the same, and to bargain, sell and dispose thereof (Plaintiff's Exs. 4, 5, 6 and 7, R. 877-880). These powers of attorney were delivered to McMurtry and duly recorded in San Benito County, and subsequently in Kern County (R. 879), and were used by him in posting and causing to be recorded location notices on the several tracts mentioned in this suit and other property, eight names being used for each tract (Plaintiff's Exs. 10 to 17, 19, 21, 23, 25, 26, 27, R. 881 to 891). In some instances he authorized third persons to use the names of the signers of the powers of attorney in making locations for themselves (See testimony Sue Greenleaf, R. 747; Earl S. Shaw, R. 763; R. 788-789).

A few days after the location in controversy in this suit was made, McMurtry, in the names of Bashore and others, under one of the powers of attorney referred to, agreed with the California Mid-

way Oil Company, through its representative, J. M. McLeod, that it should proceed with the development of the property covered thereby, and the northeast quarter of the section located by him in the names of another group of the New York parties, on substantially the same terms as the previous contract with Mrs. McLeod as modified, but under the New York locations (R. 779).

In January, 1909, the California Midway Oil Company commenced drilling for oil on the south sixty acres of the northwest quarter and continued such work to discovery (R. 763). On May 17, 1909, McMurtry, as attorney in fact for the New York locators, conveyed their interest in the entire north half of the section to J. M. McLeod, subject to the outstanding contract under which the California Midway Oil Company was in possession and at work (Plaintiff's Ex. 34, R. 899), and simultaneously therewith and as a part of the same transaction McLeod agreed in writing that if oil should be discovered on either of the quarters he would immediately make application for patent therefor, and upon issuance of the receiver's final receipt would, by good and sufficient deed, grant, bargain, sell and convey to the locators the North 100 acres of each quarter (Plaintiff's Ex. 33, R. 895).

On December 3, 1909, McMurtry as attorney in fact for the McMurtry locators assigned all right, title and interest in the contract of May 17, 1909 (Plaintiff's Ex. 33), and in other contracts (Plaintiff's Exs. 33, 55 and 57, R. 909-910) with McLeod

to C. L. Claflin, his attorney (Plaintiff's Ex. 30, R. 894), and on the following day Claflin transferred the same to McMurtry (Plaintiff's Ex. 31, R. 894).

About May, 1910, McMurtry as attorney in fact for the New York locators sold or contracted to sell the west forty acres of the north one hundred acres of the northwest quarter to the Columbus Midway Oil Company for $100,000, and received in payment therefor the sum of $10,000 (R. 843-845; 856-855), and on March 22, 1911, as such attorney in fact deeded the property to the company, securing himself for the payment of the balance due thereon (R. 842 and 818). The Columbus Midway subsequently made default in the payment of the balance of the purchase price, and on November 22, 1912, conveyed the property to McMurtry individually in satisfaction thereof, and the record now so stands (R. 818, 856).

In June, 1910, overtures were made by a representative of McMurtry to the Associated Oil Company to sell to it the remaining 60 acres of the northwest quarter and the north 100 acres in the northeast quarter of Section 32, and 1280 acres in various other tracts covered by paper locations made by him in the names of the New York parties (R. 846-847).

On August 4, 1910, a written contract was entered into between the New York locators, by McMurtry as their attorney in fact, and W. F. Herrin and others known as the Herrin grantees acting for the

Associated Oil Company, which agreement set forth that the sixteen named persons, each of whom had executed a power of attorney to McMurtry, represented that on January 1, 1909, they had legally located the northwest and the northeast quarters of Section 32, Township 31 South, Range 23 East, M. D. B. & M., under the mining laws of the United States; that they were still the owners thereof, subject to the deed to and agreement with McLeod of May 17, 1909; that a discovery of oil had been made on the northwest quarter in May, 1909, and that ever since that time they, either by themselves or their agent or representative, had diligently and continuously operated the property to the end that a discovery of oil should be made upon each and both of the quarter sections; that the Thirty-Two Oil Company had an apparent interest in the property, and L. B. McMurtry had an interest in the said lands with the sixteen persons, that is the locators; and that McMurtry is the duly authorized, empowered and acting attorney in fact for each and all of the sixteen named persons, with the right to sell their interest in the property and make conveyance thereof.

The contract then provides that in consideration of $5,000 paid to McMurtry by the Herrin grantees he would place in escrow deeds executed by himself as attorney in fact for each and all of the locators conveying to the Herrin grantees all their interest in the north 100 acres of the northeast quarter and the north 100 acres of the northwest quarter except

the west 40 acres of the latter tract, and also deeds from McLeod, the Thirty-Two Oil Company, and himself individually conveying to said grantees their interest in the property; that he would proceed forthwith to obtain from the various locators deeds in proper form to be recorded pursuant to the laws of California, an acknowledgment that at the date of such agreement his power of attorney was in full force and effect, and also a ratification and confirmation by each and all of such persons of the execution of such deeds. The purchase price of the 160 acres in the north half of Section 32 was to be the sum of $430,000, $175,000 of which was to be paid in cash and the balance, with interest, in production. It was agreed that immediately upon the deeds referred to being placed in escrow by McMurtry the Oil Company would deposit with the Bank of California $85,000, which should remain in escrow until the ratification and confirmation provided for should be obtained from the locators, when it and the $5,000 previously paid to McMurtry should be applied on the purchase price of the property. The remaining $85,000, with interest, was to be paid within six months thereafter, and in case the ratifications were not obtained the $5,000 should be returned and the $85,000 deposited in the bank withdrawn by the Oil Company. The balance of $255,000 was to be paid from production at the rate of twenty cents per barrel. The contract also recites that the Associated Oil Company, as the agent of the Herrin grantees, had made and entered into

contracts with McMurtry as attorney in fact for the purchase of other tracts of land located in the names of the New York locators, aggregating 1280 acres, at an agreed price of $1593.75 per acre, payable from the oil produced from such property. In case the grantees should be dispossessed by the United States or other claimants of any of the property it should not be responsible for the unpaid purchase price of such property or for damages on account thereof. It was agreed that the $5,000 advanced by the Associated Oil Company to McMurtry was to be a lien upon all the interest of said McMurtry in and to said land (Defendant's Ex. K, R. 913, et seq. R. 861).

The deposits in escrow were made by the respective parties as provided in the contract and the attorney for the proposed purchasers prepared a form of ratification to be executed and acknowledged by the several locators, as follows:

> I, the undersigned, do hereby acknowledge that that certain power of attorney of date the —— day of December, 1907, and recorded in Book 10 of Powers of Attorney at page 21, Records of Kern County, State of California, by me together with seven others executed to L. B. McMurtry is and at all times since said date has been in full force and effect and has never been revoked or modified; and I do hereby ratify, approve and confirm those certain contracts of sale made for me and in my name by L. B. McMurtry as my said attorney in fact with W. F. Herrin et al. of date the 4th

> day of August, 1910, and all contracts, agreements, deeds and conveyances made by my said attorney for me and in my name of and concerning said contract of sale and sale, and also all other contracts and transactions and acts made or done under said power of attorney by the said L. B. McMurtry.
>
> (R. 781; Government's Ex. No. 1, R. 167.)

McMurtry thereupon went to New York and in due time obtained from all of the 32 persons who had previously given him powers of attorney, except one who was dead, the execution and acknowledgment of the above ratification (R. 781, 810). It was represented to them at the time the ratifications were requested that McMurtry had made locations in their names under the powers of attorney given him and had sold or contracted to sell part of the land so located. $250 was paid to each of the locators, either at the time of the signing of the ratification or subsequently thereto, by check signed by one Searles but which was cashed by him upon being endorsed by the payee thereof (R. 907, 908). Upon the back of each check and immediately above the endorsement of the payee was the following:

> Received from L. B. McMurtry $250.00, in full payment for all my right, title and interest in and to all lands located by said L. B. McMurtry, on my behalf, in Kern County, California, pursuant to a Power of Attorney made by myself and others to said L. B. McMurtry, bearing date the 19th day of December, 1907.
>
> (Plaintiff's Exhibit No. 50, R. 908.)

Thereafter and in 1910 the ratifications were delivered to the Associated Oil Company, the deeds previously deposited in escrow by McMurtry withdrawn by it, the money deposited by the oil company paid over to McMurtry, and the sale consummated (Defendant's Ex. 0-1, R. 927; R. 782, 860.

In August, 1911, McMurtry caused to be organized the corporation known as the Pacific Oil Lands Company, with a capital of one million shares of the par value of one dollar each, and himself subscribed for all of the stock except three shares (R. 783, 815). On September 1, 1911, acting for himself and as attorney in fact for the New York locators, he transferred to such corporation their interest in the contracts of August 4, 1910, with the Associated Oil Company and a contract with McLeod covering another section (Plaintiff's Ex. 32, R. 894).

A short time after the organization of the Pacific Oil Lands Company McMurtry canceled or caused to be canceled a part of his subscription to the capital stock of the corporation, and to be issued in lieu thereof certificates to A. E. Hoeppner and F. E. Harrison, and 1,000 shares to each of the thirty-two locators (R. 783, 486). The certificates of stock in favor of the locators were delivered to them some time about September, 1911, by McMurtry or his agent (R. 783), it being explained to them at that time that McMurtry had caused the organization of the Pacific Oil Lands Company for the purpose of handling the property located by him under the

power of attorney, and that such shares represented their interest therein (R. 784). They were advised at the time to hold the stock as it would prove valuable, and in August, 1913, the several locators, at the request of the Secretary of the Pacific Oil Lands Company, gave to McMurtry a proxy authorizing him to represent them and vote their stock at a meeting of the stockholders of the corporation to be held in San Francisco (Plaintiff's Ex. 5, R. 175). In December, 1913, they were advised by letters of the Secretary of the Pacific Oil Lands Company that the corporation had $20,000 in cash which it wished to distribute among the stockholders as a dividend, but under the laws of California the directors could not do so without the consent of the stockholders, and enclosing a written consent to such distribution with the request that it be signed and returned, which was done accordingly (Plaintiff's Ex. 32, R. 481; Government's Ex. 6, R. 176).

In January, 1914, they received from the Secretary of the Oil Company a check for $20.00, enclosed in a letter saying that it represented their dividend as declared by the directors in pursuance with their written consent; and there was also enclosed with such letter a statement covering the affairs of the company entitled "Pacific Oil Lands Company. First Report to Stockholders." (Plaintiff's Ex. 34, R. 483; Plaintiff's Ex. 35, R. 484).

Thereafter, in the spring of 1914, F. H. Searls called upon the several locators and offered to take up their stock in the Pacific Oil Lands Company

and pay each of them $250 therefor. The locators accepted this offer, transferred their stock in blank to one Walter S. Brann and accepted the $250. This sum, together with the $250 previously paid and the $20 dividend, is all the locators ever received on account of the location made in their names by McMurtry.

Upon this testimony the Court found the location made in 1909 was for the use and benefit of the New York locators named therein; that the location of the land on January 1, 1909, in the names of the New York locators was not for the benefit of the California Midway Oil Company and to enable McMurtry to comply with his previous contract with Mrs. McLeod and others. (259 Fed. 343-355.)

The Associated Oil Company is not now in the case. On May 2, 1921, an order was entered in this Court remanding this cause to the District Court of the United States for the Southern District of California, Northern Division, and directing that a mandate issue out of this court directing said District Court to dismiss said cause as to the Associated Oil Company in view of and because of its relinquishment to the United States of America of all right, title and interest in and to the land claimed by it and the acceptance of a lease therefor under the provisions of the Act of Congress approved February 25, 1920. In accordance therewith mandate issued and pursuant to the terms thereof an order was entered in the Court below May 5, 1921, dismissing this cause as to Associated Oil Company.

ARGUMENT.

There are three questions which we wish to present for the consideration of this Court. There are nine points in the assignment of errors (R. 112) but they are merely different ways of putting these three questions.

The first is, whether the Court was warranted in holding that the power of attorney under which the land in suit was located was executed by the New York locators in good faith and the location made for their sole use and benefit.

The second is, whether the Court was warranted in holding that the location made on January 1, 1909, on the land in suit was for the use and benefit of the New York locators and not for the benefit of the California Midway Oil Company, claiming sixty acres under a previous contract made by McMurtry as attorney in fact for the Chicago locators.

The third is, whether the Court was warranted in holding in substance and effect that the California Midway Oil Company and the Associated Oil Company having acted in the utmost good faith both in acquiring and purchasing the locators' interest and paying therefor without notice, knowledge or suspicion that there was or could be any question about the bona fides thereof, such purchase by said defendants of the alleged interests of the persons in whose names such location was made entitled said defendants to rights to which otherwise they might not have been entitled.

I.

THE LOCATION WAS INVALID AS ATTEMPTING TO OBTAIN MORE ACREAGE THAN ALLOWED BY LAW.

The land here involved was located January 1, 1909, as the Montana Placer Mining Claim, in the names of H. E. Bashore, R. B. Welch, W. A. Keenan, William Mahr, Herbert M. Walker, Eugene Metz, F. H. Romaine, Jr., and C. Rupert Walker, known as the New York locators, by L. B. McMurtry, under power of attorney executed by the eight persons named on December 19, 1907. Prior to the location referred to the same land had been located on January 3, 1907, in the names of J. L. Bacon, J. H. Dolbers, W. H. Mahoney, C. W. Nettels, Thomas H. Lee, Hokan Roll, Bert S. Dennison, and H. Hagenbuck, known as the Chicago locators, by L. B. McMurtry under power of attorney executed by the eight persons named, together with eight others, on December 21, 1903 (Plaintiff's Ex. 28, R. 893).

For many years prior to January 1, 1909, McMurtry had been engaged in speculating in and disposing of alleged locations of prospective and undeveloped oil lands a part of the public domain in California. His idea of what a bona fide locator was and what his intenitons were in locating these lands, it is submitted, are material. McMurtry testified:

> It hadn't entered my head—let me make a further explanation—my understanding up to

> 1916, at the time this case was before the United States Court, that a dummy was a man who did not exist, or in taking some man's name without his knowledge and using it, but it appears that the Special United States Attorney General passed a different construction on it, and claimed a man is a dummy who really hasn't an interest in the property (R. 824-5).

Also:

> But where a man had not received any money for the use of his name, if he was a bona fide citizen of the United States, I never realized that he was a dummy locator. (R. 827.)

He also testified:

> Q. Is it the truth that they were bona fide locators at the time you made the location; as you understood it, was Mr. Taylor a bona fide locator? A. That depends on what is considered a bona fide locator. Q. What did you consider it at the time? A. I considered that he was, because he was a live man. (R. 834.)

McMurtry up to 1916 understood that a "dummy" was a fictitious person; or one whose name was used as a locator after receiving money for the use of his name. A "live" person whose name was used with his knowledge and who received no money therefor was, without regard to any interest such a one might have in any location made, a bona fide locator in the mind of McMurtry. McMurtry seems to have been very much surprised when in 1916 he learned that attorneys for the Government were claiming that a man is a "dummy" who has no

interest in the property located in his name. What was done under the Chicago power of attorney and New York power of attorney should therefore be considered in the light of what McMurtry had in mind when he was seeking locators.

THE CHICAGO LOCATORS.

In 1903, while McMurtry was in Chicago attempting to sell stock in an oil company, he secured, through Mr. C. A. Dunbar, the signatures of the so-called Chicago parties to the powers of attorney. Using these powers of attorney during the years 1905, 1906 and 1907, he located lands in San Benito County, and in January, 1907, in Kern County; and acting under one of these powers of attorney, in October, 1908, entered into an agreement with Mrs. J. M. McLeod affecting the land in suit. Mr. Dunbar, who himself signed one of the powers of attorney, testified:

> I signed it out of friendship for Chadburn and McMurtry. Didn't know it amounted to anything. Had no intention whatever of taking up any public lands for my own benefit or use. Don't recollect that McMurtry ever said anything to me about this paper. Chadburn said he wanted it for McMurtry to use for the Oriental Oil Company. Don't recall that he said how it was to be used. Didn't know my name was to be used in the location of oil lands, nor did I have any intention of claiming any lands that my name might be used to locate. Didn't know I was signing a location of that kind.

> * * * I was doing that as a personal favor to Mr. McMurtry. Q. Did you ever intend by signing this power of attorney to acquire a patent to any public oil lands in the United States. A. I didn't know that I had any. At that time I didn't know that I had any right whatever to oil lands of any kind (R. 123-124).

And as to the securing of the signatures of others, Dunbar testified:

> Mr. Love and I were instrumental in getting the signatures; I asked some of them to sign. Took them as they came in the office, wherever we thought a man would sign, we asked him. I didn't explain to any of them just what they were signing or what the rights would be under the laws of the United States. I couldn't make any explanation in that respect at all, because I didn't know myself. They signed as a favor to Love and myself more than any other reason. At that time around the stockyards it was very easy to get a man to sign his name to a paper of almost any description. There were papers of some kind circulated through that building every week, even to this day, asking for signatures. It was formerly our custom to sign them (R. 125).

Fourteen of the Chicago locators testified that they did not remember signing the powers of attorney, or did not know the significance thereof, and had no knowledge of the locations made in their names or of McMurtry until approached in the matter by a representative of the General Land Office in 1916. The testimony of the Chicago locators

shows that they were without an interest, acting wholly in the interest of McMurtry or some other person. It is such locators as are described in this testimony that McMurtry was relying upon when under the power of attorney the agreement of October, 1908, was entered into with Mrs. J. M. McLeod, to whose interest the California Midway Oil Company succeeded in November, 1908.

About November, 1908, however, McMurtry discovered that in locating this land in the names of the Chicago locators some errors had been made in the spelling of the names of the locators and in the use of initials. As to this situation McMurtry testified:

> I have a dim recollection of telling McLeod that the matters would be adjusted satisfactorily. I can't say just what I meant by that, because I don't know just what my thought was at that time. I thought perhaps they might be corrected from Chicago, or some other way. I knew there would be some remedy for it in some way. * * * I advised McLeod of the defects and that I would remedy the same. (R. 776.)

He also testified that it was not until "the very latter part of 1908" that he determined to use the New York locators in relocating the land (R. 778). So that up to that time apparently he still believed that the so-called defects might be "corrected from Chicago." McMurtry had in his possession at that time a power of attorney from the New York locators, and apparently not being able to correct these

defects without going to Chicago, he used that power of attorney and relocated this land, as well as all the other lands in Kern County that had been located in the names of the Chicago locators.

It may be true, as stated in the opinion of the Court below, that—

> None of the defendants claim under the Chicago locations, nor did the New York locators, at the time the powers of attorney were executed by them and the locations made in their names, have any notice or knowledge of the Chicago powers of attorney or McMurtry's actions thereunder, nor did they obtain such information until long after the sale of their interests, if any, had been completed and final payment made. (259 Fed. 343, 350.)

It may also be true that the Chicago locations were mere paper locations and whatever rights, if any, were acquired thereby lapsed or were abandoned before discovery and the property thereby became open to relocation by any qualified person or persons (Ibid. 350). Granting these things, it is submitted that the evidence showing the circumstances under which the so-called Chicago powers of attorney were secured and the locations thereunder made is entitled to great weight in determining the bona fides of the alleged locations made by McMurtry under the so-called New York power of attorney under one of which locations the defendants here claim. The statement of fact shows that the signatures to the New York powers of attorney

were secured in practically the same manner as were those to the Chicago powers of attorney. When in 1907 McMurtry secured the signatures to the New York powers of attorney he had the same idea as to what a bona fide locator was as when he secured the signatures to the so-called Chicago powers of attorney. In the light of the fact that this very land had been located in the names of the Chicago locators and obligations assumed thereunder, it is submitted that a consideration of the facts and circumstances surrounding the securing of the powers of attorney under which the Chicago locations were made is justified.

To illustrate or establish fraudulent intent, in civil or criminal actions, evidence of other acts of the party of a kindred character are allowable.

> *Wood v. United States,* 16 Pet. 342, 360, 10 L. Ed. 987, 994.
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> *Castle v. Bullard,* 23 How. 172, 176-177, 16 L. Ed. 424, 428.
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> *Lincoln v. Claflin,* 7 Wall. 132, 138, 19 L. Ed. 106, 109.

It is submitted that if it is found that the so-called Chicago locators were without an interest then that fact, taken into consideration with McMurtry's idea of what a bona fide locator was, is of great importance in reaching a conclusion as to the character of the New York locators. McMurtry apparently was willing to rely upon the Chicago locators, and undoubtedly would have relied upon them

except for the so-called defects. He believed that because of the so-called defects he could not make a satisfactory transfer (R. 806). It was not because these locators were without an interest, as the testimony amply shows they were, that he decided not to rely upon them, but because of what he believed to be defects in form.

> We are of the opinion that it is not permissible to consider the coal entries herein involved separately and apart from the whole scheme portrayed by the evidence which had in view the acquiring of the public coal lands of the United States in the manner shown.
>
> *United States v. Kirk,* 248 Fed. 30, 35.

THE NEW YORK LOCATORS.

Having in mind the situation up to December 31, 1908, let us proceed to the New York locators. McMurtry had been selling stock during the year 1907 in New York in a company known as the Empire Oil and Development Company. The panic of that fall had stopped all efforts in that direction and he decided to return to California. Before returning he decided to get these powers of attorney under which the New York locations were made. Accordingly, they were secured in December, 1907. They were procured by friends and former associates of McMurtry in the Empire Oil and Development Company, in which his associates had lost money. Referring to the situation as it existed at the time the powers of attorney were secured, he testified:

> My recollection was that in securing these powers of attorney it was for the specific purpose of locating lands in San Benito Field, and that if the property proved to be oil land to repay—well, there were two or three of those men who had secured powers of attorney that had advanced money for the Empire Oil Company—to repay them their money. (R. 824.)

He caused the powers of attorney to be prepared but was not present when any of them was executed. During a discussion as to the financial condition of the Empire Oil and Development Company he asked Thickens, Thorn, Searls and Powell to get them executed (R. 777). He had no conversation with any of the persons who signed them in regard to the location of lands thereunder, nor did he by writing or otherwise communicate to them any of his plans or intentions other than those named. McMurtry testified:

> When I asked Thorn, Searls, Powell and Thickens to get these powers of attorney I said nothing about what they were to get. I asked them simply to get thirty-two locators to locate San Benito property. (R. 798.)

> The remark that I made to them, in my room, was to this effect: I asked them first if they could get these powers of attorney. They said they could. I told them that I wanted them for a specific purpose and if the land proved to be oil land that we would make some money out of it. That is all that was ever said to them. (R. 819-820.)

Referring specifically to one of the New York locators, he testified:

> I testified that no promise was ever given Taylor to give him any interest in the locations; that there never was any intention of doing so; that Taylor never had any interest in these locations. (R. 824.)

The testimony of Thorn (R. 668-669), Thickens (R. 739), and Powell (R. 312-313) corroborates that of McMurtry. Powell testified that McMurtry—

> suggested that he obtain a power of attorney from a number of interested parties and asked me to secure some, so that if, when he returned to California, there were public oil lands, which might be available as oil lands, he would be in a position to locate them. By interested parties he meant those interested with us in the Empire Oil & Development Company. (R. 312.)

After securing these powers of attorney McMurtry returned to California and located lands in San Benito County, and, under the circumstances heretofore referred to, relocated the land in suit on January 1, 1909, together with other tracts.

As to the particular locators on the tract in suit, all of them except R. B. Welch were at the time the power of attorney was executed employes of J. B. Thickens. R. B. Welch was a brother-in-law of Thickens. The testimony of all of them was taken. The locators upon this quarter-section testified with reference to the circumstances under which the power of attorney was executed as follows:

H. E. BASHORE: He (J. B. Thickens) came to me one day and asked me to sign my name to a paper which, he said, was a power of attorney giving McMurtry power to locate certain oil lands in California. He said I would not he required to put up any money, and by my signing this paper it would mean a lot to him as well as assist Mr. McMurtry. Under those conditions I did not hesitate to affix my signature, knowing that I would not be involved financially in any way, shape or form. Had no intention of acquiring land for myself, and was never informed of my name being used at any time in locating any land. (R. 676.)

R. B. WELCH: Q. Did you have any conversation with Mr. John B. Thickens about signing this power of attorney? A. Not that I remember.

Q. Well, what, if anything, was said to you prior to the time you signed the power of attorney, by Mr. Thickens? A. I cannot recall.

Q. Where were you when you signed it? A. I cannot recall that.

Q. Were you in the city of New York? A. I cannot say.

Q. Did you appear before a notary public when you signed it? A. I cannot say that.

Q. Why did you sign it? A. I cannot recall why I signed it.

Q. You cannot recall that you did sign it? A. I suppose that I did; I signed several papers, but I cannot recall that I signed this particular one.

Q. Why did you sign any papers in respect to this matter? A. Why, I trusted to my brother-in-law and signed whatever he asked me to sign.

Q. What purpose did you have in mind when you signed these papers? A. Why, I don't know.

Q. Were you familiar with the laws of the United States at that time governing the location or the making of placer mining claims upon the public domain of the United States? A. I was not.

Q. At the time you signed this power of attorney, what was your intention with respect to exercising your rights under the laws of the United States, in taking up or locating upon the public domain? A. I suppose I was locating a claim and that some day it would be worth some money.

Q. Where did you get any information which engendered that supposition in you? A. From Mr. Thickens, I suppose, if I got any. (R. 250-251.)

C. RUPERT WALKER: I was over in Nixon & Thickens and signed this paper for them. J. B. Thickens presented it to me. Don't remember any conversation with him prior to the time I actually signed the paper with regard to signing it. Remember going with Thickens before a notary there, but don't know who that was, though, now. Signed the paper as a favor to Mr. Thickens because he was my boss and employer, and I had full confidence in him. Don't remember just what Mr. Thick-

ens said at that time, except that I know that I signed it as a favor to him, and the others had signed it. This was ten years ago, and it is very hard to bring it back to my mind. (R. 596.)

WILLIAM A. KEENAN: Thickens presented this paper to me. Had no talk with him before about oil matters. To the best of my understanding, no one else was present but Thickens and myself. Thickens asked if I was twenty-one years of age and I told him I was, and he said I want you to give me your power of attorney, and I want Mr. McMurtry to locate oil lands for us in California.

Q. And by "us" whom did he mean, if you know? A. There were at that time at least three or four signatures on the paper, at the time I signed it. I then knew Herbert M. Walker, F. H. Romaine, Jr., C. Rupert Walker, Eugene Metz, William Mahr, and H. E. Bashore, but not R. B. Welch. At that time I don't think there was any further conversation than he mentioned about the power of attorney, and said it would prove of value to us in the future. (R. 610-611.)

EUGENE METZ: Thickens came to me and asked me if I would give a friend of his a power of attorney to go and locate lands for me, and so I asked him what it was for, and he said to try and find oil, and he said to me if he found oil, you would probably make a lot of money out of it, and so naturally I became interested, and I was willing to sign it, and I signed it. I think that was the only conversa-

tion I had had with anyone before the signing. I then knew, as a citizen, I was entitled to some land in this country, if I could get it. My father had taken some farm land in Wisconsin and I didn't know but maybe I was entitled to the same thing. No, Thickens didn't say he was trying to get farm or mineral land. He said to try and locate land and get oil. No, I didn't then know how many acres constituted a claim or how many persons were required to make an association claim and received no particular advice on that matter from Thickens that I recall. (R. 587-588.)

FRANK H. ROMAINE, JR.: Did not know McMurtry at the time I signed that power. Thickens brought it to me and explained it, and explained the usage of selling California oil lands at that time, and he said there was no question but what the transaction was clean, above the table, and all that, and of course he was one of my employers and naturally I thought that there could not be anything outside of what he said, and besides that, it was the way that lands were being located in California at that time, according to the laws of California, so I signed the power of attorney right then, after he had explained it to me. (R. 573.)

HERBERT M. WALKER: It was probably Mr. Thickens who presented it to me, but I cannot remember just little details that far back. I was connected at that time with Nixon & Thickens, in the capacity of salesman, and Thickens knew this McMurtry and at that time I believe McMurtry was interested in some oil

company that he wanted to sell shares for; that was prior to December, and Thickens wanted me to buy some shares of stock in that oil company, and at that time I didn't have any money to put in oil stocks. I didn't buy any, and a little later Thickens came along and he said he had a friend by the name of McMurtry who was well up on oil lands and that he believed if he would give me the power of attorney to locate oil lands for us. it would prove valuable, and therefore I gave him the power of attorney. (R. 624-625.)

WILLIAM A. MAHR: Mr. Thickens asked me to sign the power of attorney, giving Mr. McMurtry power to locate lands for me, oil lands, in California. We had been talking about it day in and day out long before I ever signed it. No, I had never seen the document before I signed it. I believe I was then at my desk. Q. And what was said at the particular time when the document was presented for your execution? A. Sign this power of attorney to locate lands for you in California. No, I did not read it. Don't remember reading any portion of it. Never had talked to McMurtry about it. No did not at that time know C. W. Thorn. I knew all the boys in the office that signed it, and think their names were on it when presented to me for signature. (R. 527-528.)

This testimony shows that some of these locators had no intention to acquire any interest in any lands under the powers of attorney, and as to others that they lacked intentions of any kind and none

of them knew anything about the mineral laws. Few of them were aware of the significance of their acts and merely signed as a favor to their employer Thickens, perhaps in the hope that there might be something in it for them. With locators of this kind McMurtry proceeded to locate many tracts of land and to make various deals for development.

McMurtry not only made locations himself, but other persons were permitted to use the names of the New York locators in making locations. The most striking case was that of Sue Greenleaf. She testified that she located fourteen claims (Plaintiff's Exhibits 17, 19, 21 and 23; R. 747-748) in the names of the New York locators. the names being signed by her in the location notices (R. 756). She testified with reference to this matter:

> I was going to locate the lands in my own name and in the names of relations; Mr. McMurtry advised me not to have anything to do with my relations, that he had the power of attorney to act for certain New York people, and that I could use those names. and he would give me a quitclaim deed, as he was the attorney in fact. He told me that if he gave me the quitclaim deeds I would have to develop these lands at my own expense, and in the event that there were any results from the development, those people were to have an interest. Nothing was said as to what interest they were to have, except that he said it would be a nominal sum, probably depending upon what I would care to give or they might ask, and that one locator

had told him he would take $250 for his interest. (R. 748.)

The transaction with the Associated Oil Company as to some of these lands located by McMurtry involved a large amount of money. Out of this transaction with the Associated Oil Company came his effort to get the so-called ratifications in August and September, 1910. From the time that these locators had signed the power of attorney until they were called upon to ratify the acts of McMurtry and received $250, they apparently forgot about the matter. They made no inquiries and received no information as to what had been done.

The so-called ratification not only purports to ratify, approve and confirm the so-called Associated Oil Company contracts, but also all other contracts and transactions and acts made or done under the respective powers of attorney by McMurtry (Ex. 1, R. 167). The ratification on its face refers to the contracts with the Associated Oil Company and it fairly appears from the testimony of McMurtry and the locators that when they were asked to sign the ratifications they were advised as to its purpose (R 782). The testimony of the locators on the land in suit with reference to the signing of the ratification is as follows:

> H. E. BASHORE: After signing this power of attorney, the next I heard of the matter was some time later Thickens asked me to sign another paper the name of which I have forgotten. * * * I read it before signing, but

don't recall any specific conversation concerning these contracts of sale dated August 4. 1910, referred to therein. Relied a good deal on Thickens, he being a personal friend. I never felt that he would ask me to do anything but what was right. I simply signed it as I did the power of attorney. I was not then informed that my name with certain others had been employed in making the placer mining locations mentioned. At the time I signed the ratification I claimed no interest in any land affected by this contract of August 4, 1910, between McMurtry and W. F. Herrin and other. (R. 676-677.)

R. B. WELCH: Q. When did you sign that? A. Unless I was looking right at it, I should say on the 19th of August.

Q. How did you come to sign that paper? A. I cannot tell you?

Q. Do you know who presented it to you? A. I do not.

Q. Can you, after reading Exhibit 8 recall now and relate to us the circumstances under which you signed that paper? A. I cannot.

Q. Do you know how it came into your possession? A. I do not.

Q. Do you know the stenographer or rather the Notary Carroll H. Brooks? A. Yes, sir.

Q. Where did he reside? A. I think he is in New Haven.

Q. Do you remember of having gone before him and executing that paper? A. Yes, sir.

Q. Was anyone with you when you executed that paper? A. I believe not.

Q. Why did you execute that paper? A. It was sent to me by someone, and I suppose it was proper to sign it. (R. 253).

C. RUPERT WALKER: The next circumstance in connection with this matter was that in August, 1910. I received a letter from Mr. Thickens to come into the office, that he wanted to see me.

(Letter produced and read in evidence as Plaintiff's Exhibit 62, as follows:)

Plaintiff's Exhibit No. 62.

"Dear Walker:

Am very anxious to see you. Have something of interest to tell you. Are you working in N. Y. and could you come in to see me some day this week. Either write me or call me on phone 201 Stuyvesant. It is important, and know will be welcome news. Just a little money coming to you, for your kindness in signing a paper for me three years ago. Will explain when I see you. Let me hear from you at once. Aug. 17, 1910.

Sincerely,
J. B. THICKENS,
79 Fifth Ave.,
N. Y. City."

Between the time I signed the power of attorney and the receipt of this letter, don't remember having any conversation or conference with any person or persons with respect to these

oil land transactions except Mr. Thickens had said that there would probably be some money coming to me. That was after I signed the power of attorney. (R 596-597.)

WILLIAM A. KEENAN: In 1910, say probably about August * * * Thickens came in to see me and asked me if I recalled the power of attorney that I had given to Mr. McMurtry to locate oil lands in California, at some time previous, and I told him yes, and he said there is some money coming to you, and it is necessary to have you ratify that power of attorney, so he took me out to a notary * * * and on the way to the notary's office I asked Mr. Thickens what had happened, and he told me that Mr. McMurtry had succeeded in locating oil lands and some of the oil lands had been sold and there was a payment of $250 coming to me, which was the beginning, and there would be more payments from time to time. (R. 612.)

EUGENE METZ: After signing the paper heard nothing of this matter until 1910 and had no conversation with any person concerning oil land matters during that time—between the signing of the paper and 1910. In 1910 McMurtry came into our office and said he had located oil lands, and he expected to get a lot of oil out of that land, and it was such a big proposition he would have to sell part of the land in order to get money to work the balance of the land; that it cost a lot of money to run the thing and the only way to get all of this money was to sell part of it and use that money. No, I didn't then know how many locations

had been made, or the area, and made no inquiry of McMurtry. McMurtry then asked me to give him a ratification of my power of attorney. (R. 588.)

FRANK H. ROMAINE, JR.: The first distinct information that McMurtry, acting under this power, had located more [oil?] land was, I think at the time we were asked for the ratification. That was in about September, 1910. Thickens told me. (Plaintiff's Exhibit No. 55, a photographic copy of the ratification dated August 22, 1910, shown witness.) Yes, that is the ratification I signed. Thickens presented it to me. Did not see McMurtry at that time. I read it over before signing, but made no inquiry of Thickens as to what lands had been located or the quantity, except this, that I was told that a man could not locate more than I believe, the expression was, a quarter section. Thickens told me that at the time of the signing of this ratification. (R. 574.)

HERBERT M. WALKER: The next thing that I remember anything distinctly about is when McMurtry came in and wanted us to give him a ratification of our powers of attorney. That was about three years later. (Plaintiff's Exhibit No. 75 shown witness.) Well, I remember now, as I read this that Mr. McMurtry wanted me to give him this ratification of the power of attorney, that before I would do it I consulted a lawyer on it, and he read it over, and he advised the word "lawfully" be inserted there, which I notice had been done. Yes, it is between the words "acts" and "made" in the next to the last line. At that time Mr. Mc-

Murtry said that he had located property out there and he had very little money, and that in order to take and develop this property further, the way it should be, he would have to take and dispose of part of it in order to work the rest of it, and I therefore took and was given to understand by him at that time that unless he could take and dispose of part of it, that we, that is, the locators, would take and lose probably all of it. Therefore we took and gave him the ratification in order to try and hold what we had. (R. 625-626.)

WILLIAM A. MAHR: The first I heard of anything having been done by McMurtry under this power was in 1910. McMurtry then came to the office. Don't remember having discussed with anyone this power between the date of signing and the date McMurtry came to the office in 1910, nor did I make any inquiries during that time with respect to what McMurtry had done under it. It was in August, 1910, that McMurtry came to the office. He wanted to get my ratification of the power of attorney and said it was necessary for him to dispose of part of the lands in order to carry on the work of the balance and in order to do that he would have to get my ratification to show that I was still alive, and that he, that I was a real live locator, as he put it, and that he was still my agent. I would not sign the ratification at first. There were four of us there in the office: Herbert M. Walker, Metz, Wilson and myself. Mr. Nixon, our boss, advised us to consult an attorney to see that the ratification was all right, and that the word "lawful" was inserted in my

> ratification and in the other three, and I signed mine. (R. 528-529.)

At the time the locators were asked to sign the ratifications referred to some of them were given checks for $250. Others did not receive these checks until a year later. On the back of each check appeared the following in typewriting:

> Received from L. B. McMurtry $250.00, in full payment for all my right, title and interest in and to all lands located by said L. B. McMurtry, on my behalf, in Kern County, California, pursuant to a Power of Attorney made by myself and others to said L. B. McMurtry, bearing date the 19th day of December, 1907. (R. 908.)

The testimony shows that all of the locators signed their names without hesitation below the statement on the check quoted above. McMurtry, referring to this payment, testified:

> I believed that that was what the locators were entitled to at that time and I gave that $250 for all of their title and interest in and to that property under location. (R. 784; also R. 821.)

Eventually McMurtry transferred the contracts with the Associated Oil Company and some other assets of a similar nature to the Pacific Oil Lands Company, incorporated by him with one million shares, par value one dollar, for which the locators received 1,000 shares each, McMurtry and his associates in California receiving the balance (R. 783,

832). The locators were given and accepted the stock as the $250 check was given and accepted. As to how the amount was determined, McMurtry testified:

> I don't know that there was any particular rule worked out as to why one thousand shares of stock were given to each of the locators. I thought that that was what they were entitled to. Yes, I determined the question as I did the amount of $250 which was paid to each of them in 1910 and 1911. (R. 784.)

Subsequently the locators were requested to sign proxies consenting to the distribution of a $20.00 dividend. All of them signed, and each sent $20.00. In the spring of 1914 the Pacific Oil Lands Company stock was taken up, for which each received $250. Each locator therefore received as a result of this transaction a total of $520.

> The evidence fully sustains the contention of the complainant that the location of Sheep Creek placer claim was merely a scheme on the part of the defendant to acquire title to the ground by using the names of his employes and friends as locators. I have no difficulty in finding this to be the case from the testimony of the defendant himself, who frankly admits that he arranged for and directed the location of said claim, and that his purpose was to be sure of having the ground located in the names of his friends, with whom he could deal on terms satisfactory to himself; and he also admits that he has paid no consideration for the conveyances which the locators have made to him. The

> evidence shows, however, that he did pay some of the locators who went upon the ground for doing so.
>
> *Durant v. Corbin,* 94 Fed. 382, 383.

The testimony of McMurtry shows that he never intended that these locators should be anything more than "dummies," to further his operations, the same as the Chicago locators had been. He testified as to one of the New York locators:

> I testified that no promise was ever given Taylor to give him any interest in the locations; that there never was any intention of doing so; that Taylor never had any interest in these locations. (R. 824.)

His testimony shows that they were all treated alike. The evidence shows that at the very inception of the enterprise, when securing the powers of attorney, he said to the four persons who secured the signers, that if they would aid him he would be able to recoup his losses and theirs. The testimony of the locators shows that they never considered themselves as the owners of an interest in the locations; they never made any inquiries as to what had been done as a result of the signing of the power of attorney; they took what McMurtry gave them and did none of those things which are to be expected of bona fide locators having a real interest in the claims located in their names.

As a result of these locations we find McMurtry not only receiving the larger part of the money de-

rived therefrom, but we find him personally claiming an entire quarter-section located in the names of eight of the New York locators (R. 817, 823), and also forty acres of the land in suit (R. 824).

> Any scheme or device entered into whereby one individual is to acquire more than that amount (20 acres) or proportion in area constitutes a fraud upon the law, and consequently a fraud upon the government, from which the title is to be acquired, and any location made in pursuance of such a scheme or device is without legal support and void. The proposition seems to be well established. (Citing cases.)
>
> *Nome & Sinook Co. v. Snyder,* 187 Fed. 385, 388.
>
> *Cook v. Klonos,* 164 Fed. 529, 538.
>
> *Gird v. California Oil Co.,* 60 Fed. 531, 545.
>
> *United States v. Brookshire Oil Co..* 242 Fed. 718, 721.
>
> *Chanslor-Canfield Midway Oil Co. v. United States,* 266 Fed. 145, 150.

In an unreported case, *United States v. Owl Creek Coal Company,* et als., from the then Circuit Court of Wyoming, in the Eighth Circuit, Mr. Justice Van Devanter, at that time a circuit judge, discussed this subject very clearly in a case closely resembling the one at bar, although it was a coal case. The evidence of lack of interest on the part of the entrymen or locators was by no means as clear and

conclusive in that case as it is here. In that case the Court said:

> If one residing in New York, without ever having seen coal lands in Wyoming, were to make entry of them with no knowledge or investigation as to their character or value, and were to make the entry through some agent, whose responsibility was an unknown quantity, and were to make the entry with money that did not belong to him, and without in any manner arranging so to have the money used, these would be most suspicious circumstances; and if thereafter you should find that person, within a short time, conveying the land to whoever did provide the money, that certainly would go very far towards proving that the entry was originally made for the benefit of the person advancing the money. But all things which lead to the inference, to implication, must be judged of in the light of the surroundings. * * *
>
> I pass then to the Owl Creek entries, the ones about which most has been said in the evidence and in the argument.
>
> The persons who made these entries are not ones to whom Mr. Alfred Sully directly made any suggestions. They are persons who were solicitored by Rufus J. Ireland and by Mrs. Myton to make entries. The evidence goes far to show that these persons made the entries merely because they were so solicited; that they hardly read the applications therefor and but illy understood them; that there was at the time no arrangement respecting the payment of the purchase price, and that their motive in making

the applications was that of doing a favor for Mr. Ireland and Mrs. Myton (one or the other). Mrs. Myton advanced all moneys used in obtaining these entries. When the entries were made the Receiver's receipts and Register's patent certificates were not delivered to the entrymen. They did not know where the purchase price came from and apparently they did not care. They did not expect to be called upon to repay it. Subsequently, and within a short time, a corporation was formed for the purpose of taking over these lands. The entrymen were not consulted about this, and after it was done they were requested by Mr. Ireland and Mrs. Myton to make conveyances to the corporation and did so without questioning the right of Mr. Ireland and Mrs. Myton to make the request. They were then given three certificates of stock in the company and a very dubious sort of explanation is given as to why the stock was given to them. They were not participants in any arrangement for the issuance of the stock, but merely assented to it as one would assent to anything in which he has no real voice. Two of the stock certificates were transferred by each of them to Mr. Ireland and Mrs. Myton. None of them exercised at any time any sort of active ownership over their entries, save as they made deeds to the Owl Creek Company. None of them made any inquiries about the land and all the way through they manifested that sort of indifference to the transaction which would be shown by one who was not a real participant for his own benefit. They did not give notes for the purchase price, did not promise to repay it,

and never did repay it. All that occurred in that regard was that the corporation, after getting the lands, gave its notes to Mrs. Myton for the amount expended by her. The corporation was created and brought into existence by Mr. Ireland and Mrs. Myton, not by the entrymen. The latter have made various statements about the transaction. In their direct examination, in so far as they were examined, they said that they made the entries for the accommodation of Mr. Ireland and Mrs. Myton; that they did not know anything about the purchase price; and that the stock came to them as a surprise, as an unexpected gift. On cross-examination they answered that they made no agreement and had no understanding that they would convey the entries after the same should be perfected. Thus part of their testimony is inconsistent with the remainder. But this inconsistency does not wholly destroy their testimony. We have the unqualified admission that none of them was looking out for coal entries at all, and that none of them made any inquiries about the matter at any time, but signed whatever papers were placed before them and acted throughout in the same way that people would who were not beneficiaries and were incurring no responsibility at all. Then we have the circumstance that Mr. Ireland and Mrs. Myton would hardly have done what was done out of mere kindly interest in persons with whom they had no family ties and no such relations as naturally would cause them to proceed as they did. We therefore must look for some other motive and my view is that the evidence reasonably will support a

> finding that Mr. Ireland and Mrs. Myton were to be beneficiaries of these entries. Maybe the particular manner in which they were to become the beneficiaries, whether through the instrumentality of a corporation and conveyances to it, was not specified, but the manner and means were to be such as Mr. Ireland and Mrs. Myton should name.

It is not necessary that it be shown that these locators were co-conspirators or that there was any previous agreement; nor is it necessary that it be shown that they intended that any other person secure an interest in the land itself.

In the case of *United States v. Wells,* 192 Fed. 870, 873, it is said:

> It is not essential that entrymen should be co-conspirators. They may have allowed themselves to be used out of mere good nature or for compensation without any appreciation whatever of the conspiracy, if one existed.
>
> Also *United States v. Wooley,* 262 Fed. 518, 521.

This Court, in the case of *Chanslor-Canfield Midway Oil Company v. United States,* 266 Fed. 145, 149-150, said:

> * * * the locators whose names were used by Hall did not know of Hall's intended use of their names to locate the lands involved * * * We have no doubt there was no willful fraud on the part of the locators themselves; but, even so, it is perfectly plain that no one of them had any intention whatever of taking up or develop-

> ing a claim upon the public lands. They were not bona fide occupants or claimants, and, although guiltless of active, positive fraud, each must be charged with a knowledge that he or she had no rights, and had no authority to make the deed to Stokes. Hall knew that the locators whose names he used refused to pay any money or to take any interest in the property, and as a consequence he acted wrongfully when he took deeds of rights which the so-called locators had acquired. No inference appears to be reasonable, except that Hall made the pretended location purely in the interests of himself, or possibly some one other than the locators themselves. (Citing *Nome & Sinook v. Snyder, supra.*)

It should be borne in mind that at the time the testimony of the various locators was taken they had been informed of the profits which McMurtry had made and realized that a large amount of money was involved. This is evidenced by a number of letters passing between two of the locators on the land in suit,—Herbert M. Walker of New York and H. E. Bashore of Harrisburg, Pennsylvania. In a letter of September 29, 1916, written by Walker to Bashore, he stated: "It appears as though McMurtry and Thickens need us again regarding the property *we located for them* in California." (R. 680.) (Italics ours.) Bashore, in his letter to Walker of October 1, 1916, stated: "At that time I signed that last paper sent me I was suspicious and if you remember I wrote Fred on the subject but *when you get something for nothing* there was not much use

putting up a fight so I fell in line with the rest of you boys." (R. 682.) (Italics ours.) In this correspondence Walker represented that he spoke in addition to himself for Mahr, Metz, Keenan (locators here), Wilson and Farrell. In his letter of October 2, 1916, Walker said, "We have been in touch with eight of the locators" (R. 684); and in his letter of October 30, 1916, to Bashore he states that he and Mahr represent ten locators (R. 688).

The testimony of the locators was taken in the spring of 1917. The testimony of many of them, considered in the light of the correspondence passing between Walker and Bashore in the fall of 1916 (R. 640 to 659), shows that they were influenced by the information that a large amount of money was involved.

> While it is undoubtedly true, as a general rule, that a party offering a witness in support of his case represents him as worthy of belief, and will not be permitted to impeach his general reputation for truth, or impugn his credibility by general evidence, he has never been considered as bound by his general statements as to motives or intention, or his bona fides in a particular transaction, but may draw any inference from his testimony which the facts stated by the witness seem to justify. Particularly is this true where the party is compelled to prove his case from the mouth of the opposite party, who may be presumed to be hostile to him.
>
> *McLean v. Clark,* 31 Fed. 501, 504.

In the case of *Booth-Kelly Lumber Co. v. United States,* 231 U. S. 481, 59 L. Ed. 1058, the various persons used as "dummies" gave explanations of their conduct, as they did in the case at bar but it was held by the Court that actions spoke louder than words. It was a case to set aside a patent, in which it would seem that a stricter rule would be applied requiring the establishment of a fraud than in a case like the one at bar. It was there said:

> Booth and Ethel La Raut, now Mrs. Lewis, meet the inference naturally to be drawn from the facts thus far stated, by testifying that it was agreed between them that Booth would get timber claims for her and the other three, carrying them, and advance the money necessary until they were able to dispose of the property,—which would seem to imply that they bought the land for speculation, contrary to their affidavits, but of course denies that they bought for the company. Both Ethel and Lucy La Raut were called by the government and both asserted that they bought for themselves, that they still owned the land, and that their deeds were executed only as security for the advances that the company had made, and there is some corroboration of Booth as to details, but the evidence for the defendants is overborne by the whole course of what was done.
>
> *Booth-Kelly Lumber Co. v. United States,* 231 U. S. 481. 486; 59 L. Ed. 1058, 1060.

It is true that McMurtry in dealing with others with reference to the property did so in the names

of the locators, so that all transactions have the appearance of having been made by the locators. But this is a case where the substance of the transaction was different from its form and in which the form was adopted in an attempt at outward compliance with the law and a showing of the utmost good faith. In such circumstances it is neither unnatural nor unusual that under an attack the participants should later persuade themselves that the form was in fact the substance, but in seeking to ascertain now what was then substance and what was merely form, the present declarations of the parties are far less significant than are their words and acts during the progress of the transaction itself.

Graffam v. Burgess, 117 U. S. 180, 186, 29 L. Ed. 839, 841.

The Court found that the powers of attorney were made in good faith but that McMurtry's conduct thereafter was such as to constitute a violation of his trust. With great respect to the learned judge, it is submitted that there is no evidence to sustain this conclusion. These locators were all intelligent men, some of them professional men, all of them men of at least average experience and intelligence. Yet they were found signing without question and without hesitation the $250 checks which contained the typewritten matter heretofore referred to. They not only signed the checks referred to, but signed each and every other paper presented to them without inquiry and without investigation, or without

information of any kind as to what had been done under the power of attorney. None of their acts at, prior and subsequent to these locations are consistent with the theory that they acted wholly in their own interest. On the contrary, all of their acts show that they allowed themselves to be used out of mere good nature or in the hope of some compensation.

McMurtry never acknowledged himself as trustee for the locators, and never treated the locators as having any interest or control in the property. He did nothing to indicate that he was not acting wholly for himself and his associates. His previous efforts in this same oil field in various enterprises, together with what his idea of what a bona fide locator was up to 1916, show that he was fully aware of what he was doing when he secured the power of attorney from the New York locators. As he testified, referring to one of the locators:

> No promise was ever given Taylor to give him any interest in the locations; that there never was any intention of doing so; that Taylor never had any interest in these locations. (R. 824.)

Taylor was in no different position than any of the others. It is submitted, therefore, the locators not having any intention in the first instance to acquire the entire interest in the public lands that might be located in their names, the New York locators were mere instruments for the purpose of

carrying out the scheme which McMurtry had in mind. Under such circumstances there could not have been the relationship of principal and agent, and therefore McMurtry could not have violated any trust.

The validity of the locations made in the names of the eight locators involved here, as well as of the other New York locators, has been before the Department of the Interior in connection with mineral applications for patent. Most of the testimony before the Court here was before the Secretary of the Interior in that matter. The Secretary of the Interior, after reviewing the testimony, found that the locations were not made for the use and benefit of the persons whose names were used as locators. A copy of the opinion of the Secretary of the Interior referred to is attached to this brief as an appendix. Although the decisions in the Land Department on matters of law are not binding on the Courts, yet on questions relating to the public land they are entitled to great respect.

Hastings and D. R. Co. v. Whitney, 132 U. S. 357, 33 L. Ed. 363.

Knight v. United Land Association, 142 U. S. 182, 35 L. Ed. 981.

Spokane Falls & N. Ry. Co. v. Ziegler, 61 Fed. 392.

II.

THE LOCATION WAS MADE FOR THE USE AND BENEFIT OF THE CALIFORNIA MIDWAY OIL COMPANY AND TO ENABLE McMURTRY TO CONSUMMATE A PREVIOUS CONTRACT MADE BY HIM AS ATTORNEY IN FACT FOR THE CHICAGO LOCATORS UNDER WHICH THE CALIFORNIA MIDWAY OIL COMPANY AT THE DATE OF LOCATION WAS IN POSSESSION OF AND CLAIMING SIXTY ACRES OF THE LAND.

The Court held that the location upon the land in suit was not for the purpose of enabling McMurtry to consummate a previous contract made by him as attorney in fact for the Chicago locators, that is, that it was not for the benefit of the California Midway Oil Company (259 Fed. 343, 355).

McMurtry had, in October, 1908, acting under his power of attorney, entered into an agreement with Mrs. McLeod. Under the terms of that agreement Mrs. McLeod was to have one-half of the quarter section. It was subsequently modified so that she was to have only sixty acres. As to this sixty acres, the California Midway Oil Company had succeeded to her interest some time in November, 1908 (Plaintiff's Exhibits 39 and 40; R. 902). In December lumber and other material was placed on the land preparatory to beginning active operations. A superintendent was in charge and other men were employed (R. 763).

J. M. McLeod, an officer of the California Midway Oil Company, and for whom Mrs. McLeod acted in entering into the agreement of October, 1908, was advised of the so-called defects in the Chicago locations by McMurtry shortly after he learned of them. Not only did he advise McLeod of the defects, but he told him that he would remedy the same, or that the matter would be adjusted satisfactorily. The Court found that McMurtry did not advise McLeod how he was going to remedy the defects, and in substance held that in view of the fact that McMurtry had decided to abandon the former locations on December 31, 1908, and make new locations on January 1, 1909, without the knowledge of either the California Midway Oil Company or McLeod, such a location was bona fide and not made in the interest of the California Midway Oil Company (259 Fed. 343, 354-355).

But it is submitted it is immaterial whether McLeod or the California Midway Oil Company knew of how the matter would be adjusted, if in fact the new location was made on behalf of the California Midway Oil Company. It is clear that McLeod, the representative of the California Midway Oil Company, knew of the defects and was told by McMurtry that he would remedy the same. McLeod relied on McMurtry to do this. The matter was remedied by making a new location January 1, 1909, and a few days later a new agreement was entered into between the parties, followed by the agreement and deed of May 17, 1909 (Plaintiff's Ex. 33 & 34, R. 895,

899), leaving the California Midway Oil Company in the same situation it had been in under the agreement of October, 1908, as modified in November, 1908. The making of the location January 1, 1909, did not make the slightest difference in the situation as to the California Midway Oil Company; it merely necessitated the making of a new agreement in the names of the new locators. McLeod, the representative of the California Midway Oil Company, referring to the situation as to the so-called defects, testified:

> I wanted it fixed up, as we had already started to carry out that contract of October 8, 1908. * * * Yes, as I then understood it, the locations would be practically worthless if we could not straighten them out. But I had in mind that McMurtry would correct these faults, and I looked to him to do so, so that I might have *my rights under the contract of October 8, 1908.* (R. 869.) (Italics ours.)

George Grant Gillette, a director of the California Midway Oil Company, testified:

> I don't think we had anything different after January 1, 1909, from what we had before, that is, what we claimed while I was with the Company. The posting of these new notices on January 1, 1909, did not interrupt or interfere with our work. (R. 863.)

Frederick V. Gordon and W. C. Price, who were interested with McLeod in the transaction by which the California Midway secured its rights in the

tract, testified along the same lines (R. 865, 866). Not only did McMurtry assure McLeod that he would be protected and the situation growing out of the so-called defects remedied, but he testified that when he made the location after January 1, 1909, he intended to make a new contract covering the property. Obviously, if he relocated the land a new agreement had to be made; but the "rights" of McLeod and of the California Midway Oil Company remained the same after January 1, 1909. With reference to his intentions, McMurtry testified:

> Q. The time you relocated the land with the New York locators on January 1, 1909, did you intend to abrogate the contract of October, 1908, and thereby deprive Mr. McLeod and his associates from the rights which had accrued to them under the contract of October, 1908?
>
> A. I intended to permit the locations made in 1907 to lapse on the 31st day of December, 1908; to relocate the 1st of January, 1909, with these so-called New York locators and make a new contract with J. M. McLeod. (R. 790.)

We find therefore that the land in suit was located on January 1, 1909, in the names of the New York locators, and that the California Midway Oil Company, which was claiming sixty acres in the quarter section, remained in possession under an agreement which gave them what they had prior to January 1, 1909, under the agreement of October, 1908, as amended in November, 1908. McMurtry frankly states that he intended to protect the rights

existing prior to January 1, 1909, when he made the location of that date. The California Midway Oil Company was thus enabled to secure sixty acres by a single location when as a single person it could under the law secure only twenty acres by a single location. This it is submitted was a fraudulent use of the power of attorney. In the well known and often cited case of *Gird v. California Oil Company, supra,* the facts as to the making of the location there in question were very similar to the facts here. It was there said:

> But, as already observed, I think the evidence shows that Irland, Bradfield, Henley, and Thompson were, in truth, all acting for the defendant company at the time of the location of the Razzle Dazzle claim, and therefore that the location should be considered and treated, not as made by the three individuals, Bradfield, Henley, and Thompson, but as made for and in the interest of the defendant company, and must, under the provision cited, be limited in amount to 20 acres of land. (60 Fed. 531, 545.)

III.

BONA FIDE PURCHASER.

The Court found that the defendants California Midway Oil Company and Associated Oil Company acted in the utmost good faith both in acquiring and purchasing the locators' interests and paying therefor without any notice, knowledge or suspicion that there was or could be any question about the bona fides thereof, and held that while this would not be

a defense that fact may be considered in a suit to set aside the locations (259 Fed. 343, 351).

The defendants named were bound to know, however, that they were purchasing only an equitable title. It is well settled that where a purchaser buys an equitable title only he derives no better title than his predecessor had, whatever value he may have paid, however ignorant he may have been of the facts or law invalidating the locations, or however great his good faith in making the purchase.

> Whoever buys from the entryman, holding no patent, but only a final certificate, buys charged with knowledge of the law that the government has authority, for proper cause, to cancel the final certificate. The entryman can convey no greater right than he has. It cannot be that, although the government retained the right, for cause, to cancel the certificate as against the entryman, this power and right could be defeated by a mere transfer of his claim by the entryman to a third party. The certificate having been canceled, the equitable title of the entryman or his transferee no longer exists. A transferee of an entryman, who purchases before the issuance of the patent, the entry being subsequently canceled, does not occupy the position of a bona fide purchaser. It is so decided in *Hawley v. Diller,* 178 U. S. 476, the reasons being stated and many authorities cited on pages 484 to 488, inclusive, 20 Sup. Ct. 986, 44 L. Ed. 1157. We find no decision of the Supreme Court in conflict with this view.
>
> *United States v. Kennedy,* 206 Fed. 47, 49. (C. C. A., 5th Circuit.)

> The plaintiff, therefore, is constrained to contend that, although the entrywoman may have lost her rights, and be without remedy in the District Court, it is entitled to protection as a bona fide purchaser for value without notice.
>
> We cannot see how the plaintiff, as the vendee of Susie L. Wellborn, can have any better title than she had. It must be remembered that throughout these transactions the government had, and now has, the legal title to the land as matter of law, and that the plaintiff, purchasing from one who holds, not a patent, but a final certificate, was chargeable with notice that the legal title was in the government, and that the certificate, for cause, was subject to cancellation.
>
> *Moses v. Long-Bell Lumber Co.,* 206 Fed. 51, 54-55.

In these cases the case of *United States v. Detroit Lumber Company,* 200 U. S. 321, which is cited by the Court in its opinion, is clearly distinguished.

In the *Kennedy* case, *supra,* it was said at page 50:

> It is a general doctrine of equity that one who purchases from a vendor who has only an equitable title, and who is chargeable with notice that another holds the legal title, takes only such rights as his vendor had, and cannot defend against the holder of the legal title as a bona fide purchaser. It is not in conflict with, but confirmatory of, this rule to hold, as was held in the Detroit Lumber Company case, supra, and in United States v. Clark, 200 U. S.

> 601, 607, 26 Sup. Ct. 340, 50 L. Ed. 613, that one who purchases from an entryman holding a certificate that carries only an equitable title, but who, subsequent to such purchase, obtains a patent conveying the legal title, may defend as a bona fide purchaser, because, by the doctrine of relation, the title is treated as taking effect at the date of the entry.

Judge Rudkin, at the hearing of the *Honolulu* case, in a remark contained only in the reporter's transcript, said:

> I never have understood that a purchaser who bought an equitable title acquired any better rights than the venor. I supposed that was the universal rule of equitable jurisprudence. (Report, pp. 114, 116.)

At the hearing before the House Committee on Public Lands, 65th Congress, Second Session, Commissioner Tallman was asked as to the attitude of the Department upon this point, and said:

> As a matter of law and as a legal proposition, we consider that a location is valid or invalid depending on whether or not there was a locator with or without interest. It does not make any difference how many people were innocent purchasers, because that is no defense. There is no such thing under the law as an innocent purchaser of an unpatented mining claim. Consequently we do not pay any attention to the fact of how honest the purchasers were or how little they had to do with the dummy part of it. (P. 1201.)

MR. SINNOTT. Is it your position that there is no bona fide occupant of a location which had its inception in a dummy entry?

MR. TALLMAN. I would say, yes, if I correctly understood your question.

MR. SINNOTT. There could not be?

MR. TALLMAN. I should say there could not be.

MR. SINNOTT. No matter how many transfers there had been of the original entry to innocent purchasers?

MR. TALLMAN. Yes, sir; that would not help the situation at all.

MR. SINNOTT. The purchaser buys at his peril, and the doctrine of caveat emptor applies?

MR. TALLMAN. Very much so.

MR. SINNOTT. And the courts have held that?

MR. TALLMAN. Yes, sir; I think so, and the department held it repeatedly. The only way in which the courts have ever verged off from that general proposition has been to hold that if by any chance the patent issued before the claim is attacked, that might change the situation as to the innocent purchasers before patent. (P. 1244.)

The last reference by Mr. Tallman is of course to show wherein the doctrine of the *Detroit Lumber*

Company case might apply, as pointed out by the Circuit Court of Appeals for the Fifth Circuit in the cases above cited.

Respectfully submitted,

RAYMOND BENJAMIN,

CHARLES D. HAMEL,

Special Assistants to the Attorney General,
Solicitors for Appellant.

APPENDIX

DEPARTMENT OF THE INTERIOR.

Washington, October 15, 1920.

A-242

United States	Involving Visalia mineral application 03428, and mineral entry 04655. Decision reversed. Application and entry rejected and canceled.
vs.	
J. M. McLeod, et al.	

APPEAL FROM DISTRICT LAND OFFICE.

Mineral application 03428 was filed November 17, 1911, by J. M. McLeod, for the Michigan placer, embracing the SW¼ Sec. 28, T. 31 S., R. 23 E., M. D. M.

Mineral entry 04655 was made October 31, 1914, by J. M. McLeod, for the Texas placer, embracing the NW¼, the Ohio placer, embracing the NE¼, and the Wisconsin placer, embracing the SE¼ of said Sec. 28, under application filed June 18, 1914, title being based upon possessory right, under Sec. 2332 of the Revised Statutes, no abstract of title being filed in 04655.

All of the above-described lands were withdrawn September 27, 1909, by the Secretary of the Interior, pending legislation, and included in Petroleum Reserve No. 2, Executive Order of July 2,

1910, and also included in Naval Petroleum Reserve No. 2, Executive Order of December 13, 1911.

By your office letter "FS" of January 5, 1916, adverse proceedings were directed in 04655, upon charges alleging no discovery of oil or gas, at date of withdrawal, and lack of diligent prosecution of work leading to discovery on any of the claims applied for, it being also charged that the locations were fraudulently made. By your office letter "FS" of August 16, 1916, adverse proceedings were directed in 03428, alleging fraudulent location of claim only.

July 12, 1918, the United States Attorney General transmitted to your office, copies of protests and requests for hearings, filed in Visalia office, on behalf of the Secretary of the Navy, in these cases, alleging no discovery of mineral at date of the withdrawal; lack of diligent prosecution of work leading to discovery, and fraudulent locations, in both cases. In order to avoid having two actions, involving substantially the same subject matter, the proceedings, ordered theretofore by your office, were suspended by letters "FS" of August 12, 1918, and you were directed to issue new notices to the claimants, and the then occupants of the land, viz., Consolidated Mutual Oil Company, Standard Oil Company, Columbus Midway Oil Company, Record Oil Company, and Caribou Oil Mining Company.

Answers were timely filed, and the issues being joined hearing was duly had, whereupon on June

14, 1920, decision was rendered in favor of the applicants.

From this decision, the Government, acting through the Navy Department represented by the Attorney General, has appealed. At the request of Mr. H. F. May, Special Assistant to the Attorney General, oral hearing was ordered before the Secretary of the Interior and the Commissioner of the General Land Office jointly, for the purpose of expediting the final disposition of the case; said hearing commenced on August 17, 1920, the Government being represented by Mr. H. F. May and Mr. C. D. Hamel, Special Assistants to the Attorney General, and the Applicants by Mr. Charles S. Wheeler.

COURT PROCEEDINGS.

At this point it may be well to summarize briefly various proceedings which have been had in the courts affecting or having a bearing on the issues in this case.

It appears that suits were started in the District Court, Southern District of California, numbered A-41, 42, and 43, U. S. vs. Record Oil Company, et al; same vs. Consolidated Mutual Oil Co., et al; same vs. Caribou Oil Co., et al. These three suits attached the NE¼, NW¼, and SE¼ of Sec. 28. In these suits Judge Bean ordered the appointment of a Receiver. Thereafter appeal was taken by the Consolidated Mutual Oil Co. and J. M. McLeod, in two of these suits, to the Circuit Court of Appeals,

9th Circuit (Nos. 2787, 2788), affecting the NE¼ and the NW¼ of said Sec. 28. Decision was rendered by the Circuit Court of Appeals on this appeal from the order appointing a Receiver, on October 8, 1917 (245 Fed., 521). The order of the District Court was reversed with dissenting opinion by Judge Gilbert. In this case the Circuit Court of Appeals, basing its action on the affidavits and other evidence submitted for and against the appointment of a Receiver, held that the facts showed that the defendants were in diligent prosecution of work leading to discovery at the date of the withdrawal.

But prior to the rendering of decision by the Circuit Court of Appeals on the order appointing a Receiver, as above stated, the District Court had proceeded to try the case on the merits, as a result of which decision was rendered on June 8, 1917 (242 Fed., 746). While apparently full testimony was taken on the merits, the three suits A-41-42-43 were dismissed, entirely on the ground of jurisdiction, by reason of the fact that an application for patent was pending, the court saying that the bills were framed on the theory that the merits of the case could be tried in the courts. Later on, it appears, this order was modified to the extent of dismissing the bills without prejudice.

There are two other court decisions involving the question of validity of the McMurtry locations, but not involving any part of Sec. 28, viz., United States

vs. Thirty-two Oil Company, et al, in the U. S. District Court, Southern District of California, No. A-38, reported in 242 Fed., 730, and United States vs. California Midway Oil Company, et al, same court, No. B-10, reported in 259 Fed., 343.

The first of these cases involved the NE¼, Sec. 32, T. 31, R. 25. The Government attacked the locations on the grounds of "dummy" locators and absence of diligence at date of withdrawal. The court decided the case in favor of the government entirely on the ground of diligence, but, with respect to the bona fides of the McMurtry locations, remarked that

> "It is claimed by the Government that the paper locations by McMurtry in 1907 and 1908, were not made by him for the benefit of the alleged locators, but for himself and others, and were therefore fraud on the mining law and void. I am disposed to believe there is merit in this contention. Indeed there can be no question from the evidence but what the alleged locations made in 1909 were not for the use and benefit of the named locators but to enable McMurtry to consummate and carry out the previous contract made by him with McLeod and others for the disposition of the property as heretofore stated."

The second of these two cases, i. e., United States vs. California Midway Oil Company, involves the NW¼ Sec., 32, 31-23. Decision in this case was based entirely on the question of the bona fides of the McMurtry locations, and is the principal case relied upon by the defendants on this subject. In

this case, Judge Bean prepared an extensive summary of the testimony of all locators as well as others. After reviewing all this testimony, Judge Bean held that the locators were not "dummies".

There is another court case, which has been frequently referred to in the record but which is not reported, probably not decided, but in which evidence was taken. This case was started in the Superior Court of the City and County of San Francisco, and is a suit by Taylor, one of the locators, against McMurtry, in which Taylor seeks to procure an accounting of the proceeds of sales of mining claims by McMurtry.

Stipulations as to evidence taken in the court cases.

Pursuant to stipulations between the attorneys for the parties in this case, the cases affecting Sec. 28 were consolidated for trial, and the following evidence taken in the court cases above referred to, was stipulated into and made a part of the record herein, viz.;

Transcript of evidence taken in United States vs. Record Oil Co., et al, A-41-42-43, in so far as such evidence related to development history;

Testimony of L. B. McMurtry taken in the Fall of 1916 in the case of United States vs. Thirty-two Oil Co., in Equity A-38;

Testimony of L. B. McMurtry and three other witnesses, taken in March, 1919, in the case of

United States vs. California Midway Oil Company, et al, Equity B-10;

The evidence taken by depositions in the case of United States vs. Union Oil Co., J. M. McLeod, et al, same court, Equity A-70, etc., consisting of nine volumes; apparently this testimony was also stipulated in the record in case of United States vs. California Midway Oil Company, Equity B-10;

Copies of affidavits on behalf of Plaintiffs and Defendants submitted in the case of United States vs. Consolidated Mutual Oil Co., et al, Equity A-41, for and against the appointment of a Receiver, the same constituting the same affidavits later before the Circuit Court of Appeals on appeal, as above stated.

Issues.

As will appear from the foregoing, it is charged (a) that as to all four quarters of Section 28, the placer mining locations were illegal and void because of fraud in that the locators did not make the locations in good faith for their own use and benefit but to enable L. B. McMurtry, by this device, to procure a greater area of land in each location than the law permits, and (b) that as to the NW¼, NE¼, and the SE¼ of said section 28, the claimants and their predecessors in interest had made no discovery of mineral prior to the withdrawal of September 27, 1909, and were not, on that date, in diligent prosecution of work leading to discovery

on said quarter sections. It is admitted by the government that diligent work was in progress on the SW¼ at the date of the withdrawal.

Bona Fides.

The four claims covering said Section 28 were located January 1, 1909, in the names of thirty-two persons, by one L. B. McMurtry, as attorney-in-fact, under powers of attorney secured in New York by F. H. Searles, C. W. Thorn, E. L. Powell and J. B. Thickens, at the request of McMurtry; the powers of attorney were dated as of December 21, 1907. These locators are referred to in the record as the "New York Locators" as distinguished from the "Chicago Locators," referred to in the next paragraph.

Prior to the locations referred to in the last preceding paragraph, the SE¼, SW¼; S½, SE¼; NW¼, SE¼, and N½N½ Sec. 28 had been located in January, 1907, in the names of parties known as the "Chicago locators," by McMurtry as their attorney-in-fact. The signatures of these parties were secured on two powers of attorney made on December 21, 1903. McMurtry instructed one A. Shadbourne to secure these powers of attorney. Shadbourne was associated with McMurtry in selling stock of the Oriental Oil Company at the time, in Chicago, and he approached one C. A. Dunbar, employed at the Chciago Stock Yards, in regard to securing the signatures. Dunbar, with the aid of a notary public, also employed at the yards, secured

the signatures without any difficulty. Fourteen of the Chicago locators testified that they did not remember signing the power of attorney, or did not know the significance thereof, and had no knowledge of the locations made in their name, or of McMurtry, until approached in the matter by a special agent of this office in the summer of 1916. McMurtry testified that in 1908 he learned that one Stratton was holding the property in Sec. 28, located by the Chicago locators, and that Stratton convinced him that the assessment work had been done on the property, or that it was not open to location, at which time he gave him a deed to the tracts, in order to clear his title, without any consideration.

It appears that the principal reason why McMurtry relocated the same land, or substantially so, in the names of the New York locators on January 1, 1909, was because he had become convinced that the locations in the names of the Chicago locators were defective, and that the only way the defect could be cured was by relocation. The conveyance to Stratton, above related, should be distinguished from the conveyance to Stratton of the New York location on the same land, related in the next paragraph.

February 1, 1909, McMurtry, in the names of the New York locators, conveyed the entire section 28 to H. C. Stratton, for the alleged consideration of board and lodging given by Stratton to McMurtry and four or six parties associated with McMurtry at a camp in the vicinity for some months, chiefly

in 1908. June 17, 1909, Stratton conveyed the entire section to J. M. McLeod, the applicant for patent.

As hereinabove stated, McMurtry located this section 28 and numerous other sections by the use of four powers of attorney, each executed by eight persons residing in New York City and vicinity. These powers of attorney authorized the attorney-in-fact to locate and convey for the benefit of the locators. The powers of attorney were procured by friends and former associates of McMurtry in another company which had been a failure and in which the associates had lost money. McMurtry proceeded with the powers of attorney to locate many quarter sections and to make various deals for their sale or development. Some of these transactions involved a very large money consideration, particularly that with the Associated Oil Company. Eventually McMurtry transferred all of the contracts and other assets which he had procured in the names of the locators to the Pacific Oil Lands Company, incorporated for a million shares, par value $1.00; the locators received 1,000 shares each; McMurtry and his immediate associates in California received all the balance. Prior to the transfer of said assets to the Pacific Oil Lands Company, the locators had received $250 each cash or some other stock as their alleged portion of the proceeds of a certain sale, and after the transfer to the company they each received what purported to be a $20.00 dividend declared by the Pacific Oil Lands Com-

pany; a little later their stock in the Pacific Oil Lands Company or other stock was taken up by McMurtry, for which each received $250. We have, therefore, a transaction whereby various properties were located in the names of thirty-two locators by McMurtry in full and absolute control of all operations and business transactions, with the result that McMurtry and his immediate associates received hundreds of thousands of dollars, of which they gave to the locators $520 each.

On this state of facts much litigation has been predicated, as same involves the validity of the title to oil lands now of great value. The questions presented are were the locations bona fide or not.

So far as McMurtry is concerned, the testimony shows that it is an indisputable fact that he never intended that these locators should be anything more than "dummies" to further his operations, the same as the Chicago locators had been, whose personal activities in the matter began and ended with the signing of their names to the powers of attorney. Having gotten the signatures of the New York locators, he considered them, at the time, as having no actual interest, and that their personal activities had ceased, so far as he was concerned.

His testimony in the case of Taylor vs. McMurtry clearly shows this to be the fact. In that case he stated that his idea of a "dummy" locator

> "Is a man who receives pay to sign a document or a power of attorney to permit you to

> locate land prior to your making a location, or a person who does not exist;"

that the pay is to be received before the location is made. Being requested to tell the truth in regard to the locators, McMurtry stated:

> "Mr. Taylor is an absolute dummy if there ever was one in an oil case."

Q. What do you mean by that?

A. I mean this: That there never was any promise given to Mr. Taylor to give him any interest in this property, neither was there ever any intention of doing so.

And again:

Q. You mean by that that Mr. Taylor never had any interest in these locations?

A. Mr. Taylor, when he signed that power of attorney, never expected to have any * * *. No representations had been made to the four men who secured these powers of attorney from Mr. Taylor. No representations had been ever made to these four men to promise any locator anything at any time.

And,

A. There never was any promise made to Mr. Taylor either directly or indirectly. The only thing regarding this was that J. B. Thickens, F. H. Searles, Edwin L. Powell and C. W. Thorn were in my room on Forty-fourth Street and I asked them if they could get thirty-two locators for me

to locate some land in San Benito County. We had been discussing the debts of the Empire Oil and Development Company and Mr. Searles advanced $6,000, perhaps over, and I made this statement: That if the San Benito proves to be oil land, we will make some money out of it. That is all the conversation so far as I know. What representations these four men may have made to the parties who signed the power of attorney I do not know.

In view of this and other testimony there can be no other inference but that McMurtry made the locations for his, and a few of his associates' benefit and interest, and that such was the purpose continuously from the time the powers of attorney were secured is shown by the testimony as a whole.

Had it not been for the fact that McMurtry was compelled by the exigencies of the deal with the Associated Oil Company to go back to the locators and procure their ratification of the transaction, probably they would never have heard any more of it, or even gotten any money out of it.

As for the parties whose names were used to locate the lands, the name of one of them—Wellington S. Christman, whose Christian or given name had been signed as William—was forged in the power of attorney and fraudulently acknowledged by his nephew, John B. Thickens. Christman, who resides at Clinton, Michigan, later signed the ratification as William, after Thickens had written, telegraphed and finally traveled from New York to Clinton,

Michigan. Christman did this for his nephew's sake and declared that he would not have gone into it for any other man living. He denied having any intention of locating for his own use or benefit any lands, and claimed no interest.

Few of the parties who signed the powers of attorney were aware of the significance of their act. They signed the powers of attorney and apparently forgot about the matter, until they were called upon to ratify the acts of McMurtry and then received the first $250, which was wholly unlooked for. Not until long after they had conveyed away their rights, titles and interests were they aware of the manner in which their names had been used, and they would still be in the dark if the title to the lands had not been attacked.

The parties did not meet or in any manner discuss the matter of locating the lands and the appointment of an agent, or for any other reason prior or subsequent to signing the power of attorney. They, the so-called principals, had no say-so in the matter. They never questioned why or wherefore they were given the money they received, but were as a whole, elated to receive it, because they considered that they had received something for nothing, and never made any inquiry as to what McMurtry had done or was doing, and took none of the steps which men who have an interest take in any business matter.

At the time the testimony of the various parties, named as locators, was taken, which is filed in this

case, and which Judge Bean summarized, the parties had been informed of the profits of McMurtry and associates, and realized that something was at stake, as evidenced by a number of letters between two of the locators, one of which, dated September 29, 1916, from H. M. Walker of New York to H. E. Bashore of Harrison, Pennsylvania, is quoted as follows:

> "I do not know whether this letter will reach you or not, but am taking a chance.
>
> It appears as though McMurtry and Thickens need us again regarding the property we located for them in California. There is a lawyer on from California now who has been in to see us all. As near as we can find out this property has been purchased by the Standard Oil Company, and the Government is bringing suit against either the Standard Oil Company or McMurtry to get the property back as government lands again.
>
> The property was sold for a very large sum and where we did get a few dollars out of it we are of the opinion here that if we do hold out we could get quite a sum.
>
> None of us here are going to do anything to further the interest of McMurtry in this transaction and are going to hold out to see the outcome of same. We believe that if we do we might get a nice bunch of money out of the property or if we do not get it the Government will get the land back, and as the Standard Oil are interested in it, it appears as though we might be able to do something.

> They need all of the locators as we understand it, and we do not know whether you have heard anything recently regarding this matter or not, but if you get this letter kindly write me and we will post you as to what we know."

The statement that the property was located for McMurtry and his associates, clearly indicates what was in the minds of the so-called locators as late as September 29, 1916.

In answer to this letter, Bashore, on October 1, 1916, wrote Walker in part as follows:

> "At the time I signed that last paper sent me I was suspicious and if you remember I wrote Fred on the subject, but when you get something for nothing there was not much use putting up a fight, so I fell in line with the rest of you boys."

The acts of the locators show that they never really considered themselves the owner of part interests in the locations, in fact they knew nothing about what was going on. They were informed that no expense, on their part, would be incurred by signing the power of attorney, and as they stood to lose nothing, they were not interested enough to investigate the matter.

In addition to the locations made in behalf of McMurtry and his associates, other persons were privileged by McMurtry to use the names of the New York parties, without their knowledge or consent. The testimony of Sue Greenleaf, one of the

privileged persons, shows the total lack of any check on McMurtry by the New York parties.

She testified that she located thirty-two claims for her benefit in the names of the New York parties, the names being signed by her in the location notice; that she had intended to locate the lands in the names of her relatives; that McMurtry advised her to have nothing to do with her relatives, as they might question her; that he had the power of attorney to act for certain New York people, and that she could use the names, and he would give her a quitclaim deed, which he did, without any consideration passing; that McMurtry told her she would have to develop the lands at her own expense, and in the event of any results therefrom, the New York parties were to have an interest which was to be a nominal sum, whatever she cared to give, one of the parties agreeing to take $250 for his interest, while the others probably would not want anything.

Much importance by the applicant is attached to the opinion of Judge Bean in United States v. California Midway Oil Company, which I have read with great interest. Judge Bean attaches importance to the fact that McMurtry in July, 1910, acknowledged, notwithstanding previous conveyances made by and to him, that the property was in fact held in trust for the locators, and was willing to execute and have executed declarations to that effect. The learned judge wholly overlooks the fact that this acknowledgment was not to the locators or

for their benefit, and the fact of his attitude in that respect was not brought to the attention of the locators. It was wholly self-serving. He never acknowledged to any of the locators that he was trustee—on the contrary, definitely controverted the claim made by some of them after the matter was in litigation. The learned judge also states:

> In making the locations and subsequent contracts, the fair conclusion from the evidence, in my judgment, is that McMurtry was acting for and on behalf of his principals and with no intention at that time of fraudulently acquiring the land or the proceeds thereof for himself, and it was not until it became apparent that a large sum of money could be realized from the transaction that his avarice or cupidity seems to have caused him to appropriate to his own use the bulk thereof without accounting to his principals, and in violation of his trust.

With great respect for the learned judge, I find no evidence to sustain this conclusion. McMurtry never acknowledged himself as trustee, never treated the alleged principals as having any interest or control over the property except the slight recognition which he gave them when he returned to them for a ratification, and never consulted them, never advised them of what he had done—indeed, did nothing to indicate that he was not acting wholly for himself and associates. Nor is it true that McMurtry was false to his trust, for the very excellent reason that he regarded himself always as principal and the locators as having signed the powers of attorney

merely for the convenience of himself and his associates. The evidence, instead of sustaining the conclusion of Judge Bean, shows that McMurtry had been engaged in other oil enterprises; that he had obtained money in New York by the sale of stock; that his enterprises had failed and he went to New York to the four persons whom he used in securing the powers of attorney, and in effect said to them, that if they would aid him in this regard he would be able to recoup his losses and theirs. And counsel for the applicant in cross-examining McMurtry was at great pains to show that after McMurtry had made the very large sums which came to him from the use of the names of the New York locators, he returned to New York and refunded to every one of the persons who had bought stock in his previous enterprises the money, probably with interest, which they had lost through him. McMurtry, on the contrary, was consistent and testified in terms that he kept the money for himself and associates as of right, since they did all the work, while the locators did nothing but spend a few moments signing their names, and got all they were entitled to, and that he regarded himself as the principal, and the locators as only a necessary convenience, is plain.

The testimony and the briefs have been carefully considered, and after mature consideration it is held that the locations are dummy in character, not having been made for the use and benefit of the persons whose names were used as locators, but for the sole use and benefit of McMurtry and his asso-

ciates, and constitute a fraud upon the Government (*United States v. Brookshire Oil Company,* 242 Fed., 718, and cases there cited).

In view of this conclusion the question of diligence requires no consideration. The decision is therefore reversed, and the locations made in the name of the New York parties held to be null and void. Mineral application 03428 is hereby rejected and the mineral entry 04655 canceled.

(Signed) Payne,
Secretary.